Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–107 OF 1998
GOPAL SRI RAM, SITI NORMA YAAKOB AND DENIS ONG JJCA
6 APRIL 1999

Legal Profession *— Practice of law — Application for sijil annual — Disqualification — Applicant a practising public accountant — Whether applicant gainfully employed in another capacity — Purposive approach adopted — Whether failure to issue sijil annual deprived applicant of his livelihood*

The appellant — a public accountant — was admitted and enrolled as an advocate and solicitor of the High Court of Malaya. His application for an annual certificate was rejected by the Bar Council on the ground that he was disqualified under s 30(1)(c) of the Legal Profession Act 1976 ('the Act'). The appellant then applied to the High Court under s 34 of the Act. The High Court refused his application. The appellant appealed. It was submitted that the words 'gainfully employed' in s 30(1)(c) refer to a contract of service and not to a contract for services. Thus, according to the appellant, an advocate and solicitor is not entitled to apply for an annual certificate only where he is employed under a contract of service in some capacity other than as an advocate and solicitor.

Held, dismissing the appeal:

(1) It is true that a literal interpretation of s 30(1)(c) would produce the meaning contended for by the appellant. However the courts no longer resort to the literal rule when interpreting statutes. Instead the courts have preferred the purposive approach. In the present instance, there can be little argument that the primary purpose of the Act is to regulate the legal profession. It is obvious that Parliament intended that persons who choose to be advocates and solicitors must exclusively practice as such. It was apparent that the High Court judge adopted a purposive approach to the construction of s 30(1)(c) of the Act. He was entirely correct in doing so (see pp 174I–175A–C, 175H–176A, C).

(2) The court agreed with the judge's rejection of the argument based on the Federal Constitution. This was not a case where the appellant had been deprived of his livelihood. The appellant already had a means of livelihood as a public accountant. Nobody deprived him of that livelihood. So the constitutional argument did not bite (see p 176G–H).

[Bahasa Malaysia summary

Perayu — seorang akauntan awam — telah diterima sebagai peguambela dan peguamcara di Mahkamah Tinggi Malaya.

Permohonannya untuk sijil tahunan telah ditolak oleh Majlis Peguam atas alasan beliau hilang kelayakan di bawah s 30(1)(c) Akta Profesion Guaman 1976 ('Akta tersebut'). Kemudian perayu memohon kepada Mahkamah Tinggi di bawah s 34 Akta tersebut. Mahkamah Tinggi menolak permohonan tersebut. Perayu telah merayu. Dihujahkan bahawa perkataan-perkataan 'penggajian' di dalam s 30(1)(c) merujuk kepada kontrak perkhidmatan dan bukan kontrak untuk perkhidmatan. Dengan itu, menurut perayu, seorang peguambela dan peguamcara tidak berhak untuk memohon untuk sijil tahunan hanya apabila beliau digaji di bawah kontrak perkhidmatan di dalam kapisiti selain daripada peguambela dan peguamcara.

Diputuskan, menolak rayuan tersebut:

(1) Adalah benar bahawa suatu penafsiran literal s 30(1)(c) akan membawa makna yang ditegaskan oleh perayu. Namun, mahkamah tidak lagi merujuk kepada peraturan literal semasa menafsirkan statut-statut. Sebaliknya mahkamah lebih memilih pendekatan tujuan (purposive). Di dalam kes seperti ini, tidak banyak yang boleh dipertikaikan bahawa tujuan asas Akta tersebut adalah untuk mengawal profesion guaman. Adalah jelas bahawa Parlimen berniat bahawa sesiapa yang ingin mengamal sebagai peguambela dan peguamcara mestilah mengamal secara ekslusif. Adalah jelas bahawa hakim Mahkamah Tinggi menerima pakai pendekatan tujuan kepada penafsiran s 30(1)(c) Akta tersebut. Beliau adalah betul sepenuhnya di dalam berbuat demikian (liha ms 174I–175A–C, 175H–176A, C).

(2) Mahkamah bersetuju dengan penolakan hakim tentang hujahan berdasarkan Perlembagaan Persekutuan. Ini bukanlah kes di mana perayu dirampas hak kepada mata pencarian. Perayu telah pun mempunyai cara untuk menyara hidup iaitu sebagai akauntan awam. Tiada sesiapa yang merampas haknya untuk mata pencarian. Jadi hujahan perlembagaan tidak memberi kesan (lihat ms 176G–H).]

Notes

For cases on application of sijil annual, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1633–1637.

Cases referred to

Carter v Bradbeer [1975] 3 All ER 158 (refd)
DP Vijandran v Majlis Peguam [1995] 3 MLJ 576 (refd)
Dunlop Estates Bhd's Application, Re [1980] 1 MLJ 243 (refd)
Madhya Pradesh v Nandlal (1986) 4 SCC 566 (refd)
Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 (refd)
Sydney Municipal Council v Campbell [1925] AC 338 (refd)

Legislation referred to

Federal Constitution arts 5, 8
Interpretation Acts 1948 and 1967 s 17A
Legal Profession Act 1976 ss 30(1)(a), (b), (c), 32, 34

Appeal from: Originating Summons No S5–24–759 of 1997 (High Court, Kuala Lumpur)

Hamid Sultan bin Abu Backer (*Hamid Sultan & Rakan-Rakan*) for the appellant.

Robert Lazar (*LH Liew* with him) (*Shearn Delamore & Co*) for the respondent.

26 January 1998

High Court

James Foong J:

The plaintiff's claim

The plaintiff was called to the Bar in the High Court of Malaya on 9 January 1997. Six days later, he applied to the defendant for a sijil tahunan (annual practising certificate). After supplying to the defendants further particulars, his application was rejected by the defendants. The rejection was on the ground that s 30 of the Legal Profession Act 1976 ('the Act') was not complied with. Dissatisfied with this decision, the plaintiff now seeks from this court the following:

(1) that he be permitted to practise as an advocate and solicitor on his own at the same time as a public accountant;

(2) that the defendants be directed to issue to him a sijil tahunan in accordance with s 32 of the Act.

The background

According to the plaintiff, he is a public accountant practising on his own under the name and style of M/s Syed Mubarak & Co, established since 1979. He has two legal academic qualifications, that of an LLB and LLM from the University of London. For the latter, he majored in tax and company law. On the legal professional aspect, he was also called to the Bar at the Lincoln's Inn, and was admitted as an advocate and solicitor to the High Court of Malaya. He now wishes to practise a dual profession: that of an advocate and solicitor as well as a public accountant in this country. He insists that there is no provision in the Act to bar him from doing so, and the defendants, being the licensing authority to issue the annual legal practising certificate, have no powers to refuse his application.

The defendants' objection

After some initial confusion, as reflected in the defendants' correspondence to the plaintiff, the defendants settled on s 30(1)(c) of the Act as a ground

to refuse the plaintiff's application. Their objection is basically: the Act does not permit the practice of a dual profession; either the plaintiff be a public accountant or he elects to practise exclusively as an advocate and solicitor. A

Legal principles to be applied

Before I proceed to consider the merits of this application, I am reminded that my role is not merely confined to reviewing a decision made by the defendants. I have to, according to the Court of Appeal decision in *DP Vijandran v Majlis Peguam* [1995] 3 MLJ 576 at p 591: B

> ... consider all the materials before him [me] and decide whether the particular applicant should have a sijil annual. In arriving at his [my] decision, he is [I am] in no way fettered by any prior exercise of discretion by the respondent [defendants]; for he does not [I do not] sit as an appellate judge. C

Analysis of the case

As s 30(1) of the Act is pertinent to the issue of this case, I append below this entire section: D

> Disqualification for practising certificate
>
> (1) No advocate and solicitor shall apply for a practising certificate —
>
> (a) unless he is practising or intends to practise either on his own account or in partnership in Malaysia; or
>
> (b) unless he is or is about to be employed full time in his practice in Malaysia by an advocate and solicitor or a firm of advocates and solicitors in practice in Malaysia; or E
>
> (c) if he is *gainfully employed by any other person, firm or body* in a capacity other than as an advocate and solicitor. (Emphasis added.)

On the facts as stated, one can immediately eliminate the applicability of s 30(1)(b) of the Act to the circumstances of this case. The plaintiff has no desire to be employed full time in his practice in Malaysia by an advocate and solicitor or a firm of advocates and solicitors. He qualifies however, under s 30(1)(a) of the Act for he intends to practise on his own account. But s 30(1)(c)of the Act disqualifies him if he is 'gainfully employed by any other person, firm or body in a capacity other than as an advocate and solicitor'. To this, his argument is that he is not gainfully employed by any other person, firm or body in a capacity other than as an advocate and solicitor. Though admitting that he practises and will continue to practise as a public accountant, he insists that he is not *employed* by any person, firm or body in the capacity of a public accountant which is not an advocate and solicitor. Being self employed in his public accountant practice, the plaintiff demands that s 30(1)(c) of the Act is not applicable to him as to prevent him from getting a sijil tahunan. F G H

From this, one can immediately identify the issue of this application to center upon the interpretation of the word 'employed' in s 30(1) of the Act.

What then is the meaning of this word 'employer'? In *Words and Phrases Legally Defined* (3rd Ed) the word *employ* covers two aspects. The first, relates to the general nature of a worker's employment. The other, confines to the particular type of work or job which he is doing under a contract of I

A service at any particular moment of time. For our purposes, it is obvious that the first category applies. Going by the *Concise Oxford Dictionary* (9th Ed), 'employ' for this purpose is defined as:

> Use the services of (a person) in relation to payment.

B In the present situation, the plaintiff operates his own accountancy firm. He claims that he is not *employed* by his own firm; he cannot be, because he and the firm are synonymous. But the defendants counter this argument by insisting that the plaintiff is employed by his clients. To this, the plaintiff's response is: that his relationship with his clients does not fall within the legal concept of being contractually employed. It was, if at all, 'a contract of C services' rather than 'a contract for services'.

Adopting the *Concise Oxford Dictionary*'s definition of the word 'employ', two qualifications are required to be satisfied before one can be considered as employed. The first is the use of the service of the person. The second relates to payment of his service. Thus when a client requires the service of a professional public accountant, and when the latter accepts for D a fee, the public accountant is considered 'employed', the two qualifications are satisfied. Often, we also refer to such appointments of professionals as being *engaged*. Even the word 'engaged' connotes a sense of being employed. In the same *Concise Oxford Dictionary*, 'engaged' is defined as 'employ or hire (a person)'. This similarly applies to another common word 'retained' to describe the engagement or employment of the service of a E professional. The word 'retain' is explained by the same dictionary as 'secure the service of (a person esp a barrister) with a preliminary payment. Here again, the mention of payment is required as a qualification. In both instances, 'engage' and 'retain' — the payment is by the client and the employment is also by the client. Thus, in relation to the phrase 'is gainfully F employed by any other person, firm or body' mentioned in s 30(1)(c) of the Act, it must be accepted to include the employment by one's own clients. When such clients are engaged in a capacity other than as an advocate and solicitor, an applicant for a sijil tahunan who is gainfully employed by them will be disqualified from obtaining such a practising certificate.

This interpretation must be the reflection of the intention of G Parliament. To construct it in the way requested by the plaintiff will expose it to absurdity, repugnance and inconsistency. Imagine, an employee who is also called to the Bar but working as an accountant in a firm of public accountant run by a sole proprietor will be refused a sijil tahunan, whilst the sole proprietor himself, with similar qualifications and circumstances, will be entitled to secure such a practising certificate.

H This court does not lack authority to construct and interpret statute to give the true meaning of the words used and to avoid absurdity, repugnance or inconsistency. The following passage in *Maxwell on Interpretation of Statutes* (12th Ed) at p 228, and adopted in *Re Dunlop Estates Bhd's Application* [1980] 1 MLJ 243 at p 245, best illustrates this principle:

I

> Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been

> intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Lord Reid has said that he prefers to see a mistake on the part of the draftsman in doing his revision rather than a deliberate attempt to introduce an irrational rule: 'the canons of construction are not so rigid as to prevent a realistic solution.

In the present situation, I am convinced that Parliament, in her wisdom, must have intended that the issuance of the sijil tahunan must be limited for those who elect to solely practise law without the inclusion of any other paid work which is not in the capacity of an advocate and solicitor.

The main thrust of the plaintiff's intention is to wedge open the legal profession to accept the practice of a dual profession. Here it is accountancy cum auditing and law. The next could be medicine and law. Doctors can then sit in their clinics and be consulted first by a patient for medical care and a little later, for his next patient, he may be involved in treating and prescribing remedies for breach of contract on a tenancy, or recommending reliefs in a matrimonial dispute. In the case of the plaintiff, he attempts to convince this court that law and accountancy are closely associated. This may be so, but each has its own distinctive nature of work. The lawyer looks after the legal aspect whilst the accountant concentrates on the figures. A knowledge of one may be beneficial to another, but you cannot perform both tasks at the same time professionally. Imagine the conflict where the plaintiff having to audit the accounts of a company of which he also acts as its advocate and solicitor. On one hand he has to be an independent examiner of accounts while on the other he may have to advise the same company on how to avoid certain entries not beneficial to the company. It may be argued that such conflict of interest can be governed, regulated or restricted by procedures. But such procedures are yet to be thought out and formulated. Contradictory situations on both these professions must be numerous. They have to be researched upon, identified, and looked into by qualified personnel well versed in both fields. Pitfalls must be recognized and solutions, which must be fair and appropriate, to overcome them must be recommended. The public must stand protected against any abuse and misdeed. Before that, to admit such a novel proposition, where no explicit provision is found in any legislation, can be disastrous and damaging to society. One must not commit the public to any unstudied proposition of this nature when the effects and consequences discovered subsequently may affect the lives of many. Avenues to advocate such a proposition as that of the plaintiff are many, and if it is well received, and properly considered and formulated, Parliament with her astuteness will certainly enact laws to allow the practice of the dual professions of accountancy and law. Until and unless such laws are promulgated, this court has a duty to interpret this

piece of legislation (s 30(1)(c) of the Act according to the intention of Parliament, and that is: in the circumstances of the plaintiff, he is gainfully employed by any other person, firm or body in a capacity other than that as an advocate and solicitor.

The plaintiff has pleaded art 8 of the Federal Constitution. He claims that by the defendants' refusal to grant him the sijil tahunan, he will be deprived of his livelihood. To my mind, this is hogwash. There is no deprivation or discrimination against the plaintiff. All that was asked from him is that he chooses which profession he wishes to practise. Either one will provide him with an opportunity to earn a living. But in this case, the plaintiff wishes to have more than one type of cake to swallow. This is not a deprivation of livelihood but an over-indulgence.

The plaintiff has also cited instances where the defendants have issued sijil tahunan to the Deputy Speaker of Parliament, executive directors of companies, and a United Nation special rapporteur. By this, he must be attempting to indicate that a dual professional practice was already permitted to exist by the defendants. I personally am in no position to comment on what status and circumstances these mentioned personnel are granted their sijil tahunan, if at all, they are so granted. To this court , the annual practising certificate can only be granted within the qualifications of s 30 of the Act. The plaintiff was refused such a certificate and towards this judicial institution he turns for relief. This court has expressed her findings, and if he has any grievances on the disparity of the issuance of this sijil tahunan to any of the abovenamed personnel for not satisfying the qualifications as laid by the Act, he should seek relief by other mode or form, but not by way of this application which only confines him to his request for the issuance of the sijil tahunan to himself.

For the reasons as I have stated above, I am satisfied that the defendants are justified in refusing to issue to the plaintiff the sijil tahunan based on s 30(1)(c) of the Act. Accordingly, this application of the plaintiff must be dismissed with costs.

6 April 1999

Court of Appeal

Gopal Sri Ram JCA (delivering judgment of the court): The short question for decision in this appeal is whether an advocate and solicitor may simultaneously practise another profession. The factual background from which that question arises is as follows.

The appellant is a public accountant. He has been practising as such since 1979. He practises under the name and style of M/s Syed Mubarak & Co. On 9 January 1997, the appellant was admitted and enrolled as an advocate and solicitor of the High Court of Malaya. He then applied to the Bar Council for a sijil tahunan or annual certificate. His application was rejected. He then applied to the High Court under s 34 of the Legal Profession Act 1976 ('the Act') for the certificate. The High Court refused his application. He then appealed to us. We heard and dismissed his appeal.

The Bar Council refused to issue the annual certificate to the appellant on the sole ground that he was disqualified under s 30(1)(c) of the Act. That provision reads:

> No advocate and solicitor shall apply for a practising certificate —
> ...
> (c) if he is gainfully employed by any other person, firm or body in a capacity other than as an advocate and solicitor.

The learned judge accepted the Bar Council's interpretation of the section. In his carefully considered judgment, the learned judge said:

> Adopting the *Concise Oxford Dictionary*'s definition of the word *employ*, two qualifications are required to be satisfied before one can be considered as employed. The first: is the use of the service of the person. The second: relates to payment of his service. Thus when a client requires the service of a professional public accountant, and when the latter accepts for a fee, the public accountant is considered employed; the two qualifications are satisfied.
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> Often, we also refer to such appointments of professionals as being *engaged*. Even the word *engaged* connotes a sense of being employed. In the same *Concise Oxford Dictionary, engaged is* defined as 'employ or hire (a person).' This similarly applies to another common word *retained* to describe the engagement or employment of the service of a professional. The word *retain* is explained by the same dictionary as: 'secure the service of (a person esp a barrister) with a preliminary payment.' Here again, the mention of payment is required as a qualification. In both instances — *engage* and *retain* — the payment is by the client and the employment is also by the client. Thus, in relation to the phrase 'is gainfully employed by any other person, firm or body' mentioned in s 30(1)(c) of the Act, it must be accepted to include the employment by one's own clients. When such clients are *engaged* in a capacity other than as an advocate and solicitor, an applicant for a sijil tahunan who is gainfully employed by them will be disqualified from obtaining such a practising certificate.

The appellant criticised this approach of the learned judge. He argued that the words 'gainfully employed' refer to a contract of service and not to a contract for services. Thus, according to the appellant, an advocate and solicitor is not entitled to apply for an annual certificate only where he is employed under a contract of service in some capacity other than as an advocate and solicitor. The appellant relied on the decision of this court in *DP Vijandran v Majlis Peguam* [1995] 3 MLJ 576 in support of his argument. With respect, we are unable to see how this case is of any assistance to the appellant. All that was there held was that the Bar Council could not use its power to issue an annual certificate for a collateral purpose. It stems from the well-established proposition that a public body cannot use its statutory powers for a purpose other than that intended by parliament. See *Sydney Municipal Council v Campbell* [1925] AC 338; *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337. What we are really concerned with in the present case is the proper construction of s 30(1)(c) of the Act.

Now, it is true that a literal interpretation of s 30(1)(c) would produce the meaning contended for by the appellant. But if you look at the decisions of our courts over the past few years, you will notice that we no longer resort

A to the literal rule when interpreting statutes. We will not use it when it will produce an absurd result. Neither will we use it if it does not advance the aim or object of a statute. Indeed, parliament has noticed the change in our attitude and given express effect to it in s 17A of the Interpretation Acts 1948 and 1967. That section reads:

B > In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

It is interesting to note that in England too the courts have preferred the C purposive approach to other guides to construction. In *Carter v Bradbeer* [1975] 3 All ER 158, Lord Diplock made some observations of general importance that merit recall. He said (at p 161):

> A question of statutory construction is one in which the strict doctrine of precedent can only be of narrow application. The ratio decidendi of a judgment as to the meaning of particular words or combinations of words D used in a particular statutory provision can have no more than a persuasive influence on a court which is called on to interpret the same word or combination of words appearing in some other statutory provision. It is not determinative of the meaning of that other provision. This is because the inherent flexibility of the English language may make it necessary for the interpreter to have recourse to a variety of aids or canons of construction, E which are not merely lexicographical, in order to select from what may be a number of different meanings which the words as a matter of language are capable of bearing, the precise meaning in which the legislature intended them to be understood. Canons of construction may prove to be conflicting guide posts: they may point different ways. Fashions in parliamentary draftsmanship and the attitude of the legislature toward innovations in established law are not unchanging. Such changes as have taken place are properly reflected in the F relative importance to be attached to the guidance given by competing canons of construction which point in different ways. If one looks back to the actual decisions of this House on questions of statutory construction over the past thirty years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions. Changes in the judicial approach to questions of statutory construction are not G the result of some specific decision of your Lordships' House identifiable as a landmark in this field of law. They have been fostered by the influence, persuasive and pervasive, of the similarity of reasoning to be found in the judgments of individual judges even though they may differ as to the result of applying that reasoning to the particular words of the particular statute which is under consideration in the case. The persuasive reasoning which involves a H reformulation of particular canons of construction or consideration of the circumstances which affect the relative weight to be attached to them, does not depend on whether the author of the judgment is among the majority or the minority as respects the actual decision in the case.

To return to the present instance, there can be little argument that the primary purpose of the Act is to regulate the legal profession. The object of I parliament is to maintain high standards in the profession. That is because the general public must have confidence in the integrity and the independence of the legal profession. It is obvious that parliament intended

that persons who choose to be advocates and solicitors must exclusively practise as such. If parliament intended that an advocate and solicitor should be permitted to practise more than one profession, one should be able to find clear language in which such permission is to be found.

If we were to accede to the appellant's invitation and apply the literal rule to s 30(1)(c) of the Act the ultimate result would not accord with the true intention of parliament. It will result in people being able to argue that one could practise both as an advocate and solicitor and, say, a doctor and as an architect as well. That would drive a coach and four through the Act. It would defeat the purpose for which the Act was passed. We cannot therefore accede to the appellant's arguments.

It is apparent from the passages that we have already quoted from his judgment, that the learned judge adopted a purposive approach to the construction of s 30(1)(c) of the Act. He was entirely correct in doing so. We would therefore affirm his decision.

There is one last point. In his written submissions lodged in the court below, the appellant relied on art 8 of the Federal Constitution. He argued that the decision of the respondent had deprived him of his livelihood. We consider the reliance on art 8 to be misconceived. That article strikes at discriminatory action by the state or a public body. It is art 5 that protects livelihood.

The learned judge rejected the constitutional argument. We agree with him. He called it hogwash. The appellant has complained about this. The complaint is justified. The words used are too strong. Judges should not resort to the use of such language. It only serves to denude the respect that they ought to command. There should always be temperance in the language in which a judgment is couched. No reminder of this is, we trust, necessary. Upon an occasion such as the present it is apposite to recall the words of Bhagwati CJ, in State of *Madhya Pradesh v Nandlal* (1986) 4 SCC 566 at p 615:

> We may observe in conclusion that judges should not use strong and carping language while criticising the conduct of parties or their witnesses. They must act with sobriety, moderation and restraint. They must have the humility to recognise that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and result in injustice.

We said that we agreed with the learned judge's rejection of the argument based on the Federal Constitution. That is because this is not a case where the appellant had been deprived of his livelihood. The appellant already had a means of livelihood as a public accountant. Nobody deprived him of that livelihood. So the constitutional argument does not bite.

In the result, the appeal was dismissed with no orders as to costs and the deposit was ordered to be refunded to the appellant.

Appeal dismissed.

Reported by Jafisah Jaafar